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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MAX WADE, Defendant and Appellant.	A141133 (Marin County Super. Ct. No. SC180336)

Max Wade appeals from a judgment sentencing him to prison after a jury convicted him of attempted premeditated murder with an allegation that he had personally discharged a firearm (Pen. Code, §§ 187/664, subd. (a), 12022.53, subd. (c)), shooting at an occupied motor vehicle (Pen. Code, § 246), taking or driving a motor vehicle without the owner's consent (Veh. Code, § 10851, subd. (a)), and receiving a stolen vehicle (Pen. Code, § 496d, subd. (a)). The first two counts arose from an incident in which he pulled up to a truck while riding on a motorcycle and fired several shots toward the two teenagers inside. The last two counts arose from his possession of a Lamborghini that had been stolen from a car dealership about a year before the shooting.

Appellant contends: (1) the counts involving the stolen car should not have been joined with the counts involving the shooting; (2) the trial court should have excluded prejudicial evidence about his flight from police at the time of his arrest and his possession of a handgun not involved in the shooting; (3) the evidence was insufficient to support the attempted murder charge; (4) the court should have instructed the jury on

attempted voluntary manslaughter as a lesser included offense; (5) the court erred by giving a flight instruction; (6) the court inadvertently failed to give standard jury instructions pertaining to the evaluation of evidence; (7) the court did not adequately respond to a jury question regarding the nature of the direct but ineffectual step required for a criminal attempt; (8) the cumulative effect of the trial errors requires reversal; (9) the case must be remanded for a "fitness" hearing before a juvenile court judge pursuant to The Public Safety and Rehabilitation Act of 2016 (Proposition 57), which was enacted while this appeal was pending; and (10) his prison term of life plus 21 years four months was cruel and unusual punishment because he was a juvenile when he committed the offenses. We agree the case must be remanded for a fitness hearing under Proposition 57, but reject appellant's other claims of error.

BACKGROUND

A. *The Theft of the Lamborghini*

On the morning of March 8, 2011, employees of the British Motors car dealership in San Francisco discovered that a 2008 yellow Lamborghini Spyder with the license plate GUYTORO had been stolen from the service area. Police officers responding to the reported theft noticed a rope dangling from the dealership's roof that passed by an open window. The lock on the rollup door on the ground floor had been cut, and by that door was a bag containing bolt cutters and a pry bar. Investigators concluded a burglar had rappelled down from the roof, entered through the window and stolen the Lamborghini. The keys to the Lamborghini had been left inside the vehicle and would have defeated the car's antitheft device.

A surveillance video from the dealership's security system showed that the rope had been dropped from the roof at 4:04 a.m. Traffic cameras 12.3 miles away in Tiburon captured images of the Lamborghini later than morning: at 4:40 a.m., the car drove into town with the GUYTORO license plate still attached, and at 6:13 a.m., it drove out of town bearing the license plate 6LGP223, which had been reported stolen the day before.

B. *The Mill Valley Shooting*

On April 13, 2012, 18-year-old Landon Wahlstrom was dating 17-year-old Eva Dedier. Between 11:00 a.m. and 11:30 a.m., the two left Wahlstrom's house in Mill Valley and got into his pickup truck parked outside. As Wahlstrom was pulling out with Dedier in the passenger seat, he saw a motorcycle approaching from behind and stopped to yield to it.

The motorcycle pulled up parallel with the truck on the driver's side, only a few feet away from Wahlstrom. The motorcycle was dark and the rider was wearing a helmet with tint on the visor, black gloves, black pants, a black vest, a black sweatshirt and a neck guard. Wahlstrom and Dedier could not see his face or skin color. The rider pulled out a black .38 caliber revolver and fired it five times toward Wahlstrom and Dedier. The two of them ducked, and the shots shattered the driver's side window without hitting them. Wahlstrom looked up and saw the rider with nothing in his hands, looking around on the ground. He drove his truck away from his house and stopped when he saw police cars.

C. *The Investigation and Appellant's Arrest*

Investigators found several bullet impact sites and three bullets in the passenger compartment of Wahlstrom's truck, and an expert in crime scene reconstruction and gunshot trajectory analysis opined that two of the bullets would have hit Wahlstrom had he not ducked. Four bullet impact sites were found in a fence near the place where Wahlstrom's truck had been parked at the time of the shooting.

Witnesses had seen the motorcycle and rider parked in a Whole Foods parking lot about 200 feet away from Wahlstrom's house on the morning of the shooting. Surveillance footage from the Golden Gate Bridge showed a motorcycle and rider matching the shooter's description going through the toll gates into San Francisco at 11:35 a.m., with license plate 18C2791 The plate was later reported stolen from an unrelated motorcycle.

Surveillance footage from a Chevron gas station 2.9 miles from Wahlstrom's house showed the motorcycle rider entered the store of the station at 10:25 a.m. on the

day of the shooting without removing his helmet or visor. An investigating deputy recognized the helmet as a Bilt brand helmet, which was available only from the Cycle Gear chain of stores. An employee of the nearest Cycle Gear shop found a receipt for a transaction on April 12, 2012, the day before the shooting, for the sale of a helmet, a mirrored face shield, gloves, a vest and a neck guard. The transaction was captured on a security video and appellant was identified as the purchaser.

Investigators spoke to Dedier about appellant and learned she had been getting fake ID's from appellant and had never been asked to pay for them. Dedier had met with appellant a total of five or six times to obtain the ID's, but had never socialized with him for any other purpose. She had seen him driving a yellow Lamborghini and he once offered to let her drive it. During a series of text messages, appellant had asked Dedier about her Valentine's Day plans and Dedier mentioned she was expecting to get something from Tiffany's from her boyfriend Landon. Appellant, who knew Wahlstrom from middle school, responded, "Ha, ha, ha. Landon from Del Mar Landon. You'll get a box of chocolates." Appellant had called Dedier "gorgeous," "babe," and "princess," and she described his typical tone with her as friendly and sometimes flirty.

At the investigators' request, Dedier set up a pretextual meeting with appellant on April 26, 2012. She called him and asked for a new fake ID and specifically requested that he meet her in his Lamborghini. Once surveillance units saw appellant driving a yellow Lamborghini to the meeting spot, they had Dedier call to cancel the meeting. Officers followed appellant to a self-storage facility in Richmond, where he parked the Lamborghini in unit 152. Three of them approached appellant in a car and identified themselves as law enforcement, at which time appellant reached near the front of his waistband. The officers got out, identified themselves and repeatedly yelled for appellant to raise his hands, but he ran away, grasping at his waistband. Another car full of officers arrived and appellant was eventually subdued, though he continued to struggle and keep his hand in his waistband. Upon his arrest, officers found an operable, loaded Glock pistol in his waistband, four loaded magazines in his pocket, and the Lamborghini key.

Inside storage unit 152 was the yellow Lamborghini that had been stolen from British Motors the previous year, a climbing harness, a dark red Honda motorcycle with the same stolen license plate as that captured on the surveillance camera from the Golden Gate Bridge on the day of the shooting, motorcycle clothing and gear identified as that worn by the motorcycle rider who had shot at Wahlstrom and Dedier, and paperwork in the name of appellant and "Carmine Colombo," a name used on a Texas ID that was found bearing appellant's photograph.

Also found in the storage unit was a .38 revolver that had been fired five times and contained one unfired bullet. The revolver could only fire in single action mode, meaning a shooter must manually cock the hammer for each shot. Testing showed that bullet fragments recovered from the Mill Valley shooting had been fired by the revolver. DNA recovered from the trigger was inconclusive but did not exclude appellant as a contributor.

The storage unit had been rented in 2011 by someone named "Carmine Leone Colombo" and had been paid for in cash. The facility's records showed that on April 13, 2012, the day of the shooting, the renter of the unit left the facility at 10:01 a.m. and returned at 12:27 p.m.

During a search of the home of appellant's parents in San Rafael, investigators seized a laptop and desktop computer and found indicia in the name "Carmine Colombo." They also found a New Jersey identification with Dedier's photograph and a document mentioning the radio system used by local law enforcement. The browser history on the laptop computer showed Internet searches in November 2010 relating to the Tiburon traffic cameras, "Lamborghini in San Francisco," "car dealer security and camera," and rappelling. On the desktop, the browser history from March 26 to April 24, 2012, contained dozens of views of Dedier's Facebook page and several views of Wahlstrom's Facebook page, as well as searches related to the Mill Valley shooting using terms such as "motorcycle assassin."

On appellant's cell phone, investigators found a communication from appellant on November 5, 2011, that included a reference to "boostin a lambo and pickin up cute

girls." In a message on February 14, 2012, he asked someone whether he should "sext" or "flirt" with "that girl Eva. I wanna fuck soo bad it ain't even funny." There were communications with Dedier and Internet searches with terms such as "mill, valley, patch, and gunshot" or "gunshots and mill and valley." The phone had also been used to search for terms relating to the stolen Lamborghini and to read news articles about the Lamborghini theft and the Mill Valley shooting.

D. *Procedural History*

Appellant, who was then 17 years old,[1] was directly charged as an adult with two counts of attempted premeditated murder with allegations he had personally discharged a firearm in the commission of those offenses (Pen. Code, §§ 187/664, subd. (a), 12022.53, subd. (c) & (g), counts 1 and 2), shooting at an occupied motor vehicle (Pen. Code, § 246, count 3), commercial burglary (Pen. Code, § 459, count 4), taking or driving a vehicle without the owner's consent (Veh. Code, § 10851, subd. (a), count 5), and receiving a stolen vehicle (Pen. Code, § 496d, subd. (a), count 6). (See Welf. & Inst., § 707, subds. (b)(12), (d)(1).) The jury acquitted him of the attempted murder count naming Dedier as a victim and the commercial burglary count, but convicted him of the remaining counts and found the firearm allegation true. The trial court sentenced appellant to prison for a life term on the attempted murder count plus a 20-year firearm enhancement under section 12022.53, subdivision (c), and a consecutive 16-month lower term for driving or taking a vehicle. Sentence on the remaining counts was stayed under section 654.

DISCUSSION

I.

Joinder of the San Francisco and Mill Valley Counts

Appellant filed a number of motions in the trial court seeking to sever the charges arising from the San Francisco vehicle theft (counts 4-6) from the charges involving the shooting in Mill Valley (counts 1-3). He contends the denial of these motions was an

[1] Appellant was born in August 1994.

abuse of discretion and deprived him of due process of law because the "largely unconnected" vehicle theft case suggested a degree of planning and criminal sophistication that "spilled over into improperly providing proof of premeditation related to the Marin County shooting." We disagree.

Penal Code section 954 provides in relevant part: "An accusatory pleading may charge two or more different offenses connected together in their commission . . . under separate counts . . . . provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately . . . ." Offenses committed at different times and against different victims may be connected together in their commission if there exists "a 'common element of substantial importance' " among them. (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1219 (*Alcala*); *People v. Macklem* (2007) 149 Cal.App.4th 674, 697 (*Macklem*).) This common element may take the form of evidence admissible as to both charges, or an intent or motivation tying all the charges together. (*Alcala*, at pp. 1219–1220.)

The charges arising from the stolen Lamborghini were connected to the charges arising from the shooting. The Lamborghini was discovered in the same self-storage unit as the motorcycle, gear and gun that were used in the shooting. Eve Dedier, a named victim of one of the attempted murder counts, had seen appellant driving the stolen Lamborghini and presumably would have been called as a witness in a separate trial relating to the vehicle theft. Dedier assisted police in apprehending appellant by asking him to come to a pretextual meeting in the Lamborghini, and his flight from officers at the time of his arrest was relevant to his consciousness of guilt as to all of the charges. This overlapping evidence made it appropriate to join the San Francisco charges with the Mill Valley charges.

When, as here, the statutory requirements for joinder have been met, a trial court's denial of a motion to sever is reviewed for abuse of discretion and will not be reversed unless it fell " ' "outside the bounds of reason." ' " (*Alcala*, *supra*, 43 Cal.4th at p. 1220; *Macklem*, *supra*, 149 Cal.App.4th at p. 698.) " 'The factors to be considered are these:

(1) the cross-admissibility of the evidence in separate trials; (2) whether some of the charges are likely to unusually inflame the jury against the defendant; (3) whether a weak case has been joined with a strong case or another weak case so that the total evidence may alter the outcome of some or all of the charges; and (4) whether one of the charges is a capital offense, or the joinder of the charges converts the matter into a capital case.' " (*Alcala*, at pp. 1220–1221.)

None of these factors establish an abuse of discretion in trying the counts relating to the stolen Lamborghini with the counts relating to the shooting. As noted, much of the evidence was cross-admissible. The counts relating to the stolen Lamborghini were not inflammatory when compared to the facts of the shooting, in which two teenagers were almost killed by ambush. The evidence linking appellant to each event was strong, with evidence tied to each crime being found in a storage unit he had rented. Finally, capital charges were not at issue in the case.

"Even if a trial court's severance or joinder ruling [was] correct at the time it was made, a reviewing court must reverse the judgment if the 'defendant shows that joinder actually resulted in "gross unfairness" amounting to a denial of due process.' " (*People v. Mendoza* (2000) 24 Cal.4th 130, 162 (*Mendoza*).) Appellant argues the joinder of the San Francisco charges rendered his trial unfair because the theft of the Lamborghini was a sophisticated and well-planned offense and the owner of the stolen car was a famous celebrity.[2] He claims the high profile nature of the theft charges overwhelmed the more serious attempted murder charges and allowed the prosecutor to argue he was a "media hungry, sophisticated criminal." Appellant also contends that evidence of the planning and preparation involved in the theft of the Lamborghini made it more likely the jury would conclude the shooting was also planned and premeditated.

We are not persuaded. To begin with, appellant was *acquitted* of commercial burglary, showing the jury was not convinced he had actually stolen the Lamborghini. This makes it unlikely the jury attributed to appellant the degree of criminal

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[2] The Lamborghini was owned by celebrity chef Guy Fieri.

sophistication he now claims is so prejudicial. Moreover, the shooting itself was obviously the product of considerable planning: switching the license plate of the motorcycle he rode to make it less likely to be traced; purchasing motorcycle clothing that would conceal his identity; watching and waiting for the victim a short distance from his home; and hiding the motorcycle in a storage unit after the shooting. Evidence that appellant had driven and hidden a stolen Lamborghini on other occasions, even if it suggested a degree of criminal sophistication, did not render the trial on the attempted murder charges fundamentally unfair.

II.

Flight and Handgun Possession at Time of Arrest

Appellant argues the judgment must be reversed because the court improperly admitted evidence he was carrying a loaded Glock semiautomatic handgun at the time of his arrest and attempted to flee from the arresting officers. We reject the claim.

Before trial, appellant moved to exclude the evidence of his gun possession as irrelevant and the evidence of his attempted flight as more prejudicial than probative under Evidence Code section 352. The trial court denied the motion, concluding the evidence was relevant and admissible to prove consciousness of guilt. We review the ruling for abuse of discretion. (*People v. Covarrubias* (2015) 236 Cal.App.4th 942, 947.)

Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Under Evidence Code section 352, relevant evidence may be excluded "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Evidence is substantially more prejudicial than probative " 'if, broadly stated, it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome" [citation].' " (*People v. Clark* (2011) 52 Cal.4th 856, 893.)

Appellant's resistance to and attempted flight from the arresting officers was relevant to show his consciousness of guilt. (*People v. Garcia* (2008) 168 Cal.App.4th

261, 283–284.) Evidence he was armed with a handgun—and was apparently trying to reach for it during the struggle—supported the inference that this consciousness of guilt extended to the more serious charges arising from the shooting, as opposed to simply the possession of a stolen vehicle. "It is permissible, in proof of the fact of flight, to show all of the facts and circumstances attending the flight either to increase or decrease, as the case may be, the probative force of the fact of flight. In other words, when testimony as to flight is resorted to, it is proper to show the extent of the flight and the circumstances thereof, including the acts and doings of the defendant, which tend to characterize and increase its significance. It was, therefore, proper for the prosecution to show, as bearing upon this question, that the defendant had ammunition and firearms in his possession which were adapted to further his flight and thereby accentuate the fact of flight. For this purpose the articles in question were admissible into evidence." (*People v. Hall* (1926) 199 Cal. 451, 460, footnote ommitted.)[3]

The trial court did not abuse its discretion in concluding the probative value of appellant's attempted flight and armed resistance was great and was not outweighed by the risk of undue prejudice. " 'The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging. ' " (*People v. Doolin* (2009) 45 Cal.4th 390, 439.) While evidence of appellant's armed resistance to the police was no doubt damaging to his case, it was also highly relevant and was unlikely to evoke an emotional bias against him.

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[3] Because the evidence supported an inference that appellant was reaching for his gun during his struggle with the arresting officers, his situation is distinguishable from cases in which the defendant's mere possession of a weapon not used in a crime was determined to be irrelevant to the charged offense. (See *People v. Riser* (1956) 47 Cal.2d 566, 576–577, disapproved on other grounds in *People v. Chapman* (1959) 52 Cal.2d 95, 98 and *People v. Morse* (1964) 60 Cal.2d 631, 637, fn. 2; *People v. Archer* (2000) 82 Cal.App.4th 1380, 1392; *People v. Henderson* (1976) 58 Cal.App.3d 349, 360; *People v. Witt* (1958) 159 Cal.App.2d 492, 497.)

Even if we assume the court should have excluded evidence that appellant was carrying a loaded gun when he was arrested, we would not reverse the judgment. The .38 caliber revolver used in the shooting was found inside appellant's storage unit, and that evidence was far more incriminating than appellant's possession of a weapon not used in the charged offenses. It is not reasonably probable the jury would have reached a verdict more favorable to appellant if it had not heard the evidence regarding the Glock handgun. (*People v. Nelson* (1964) 224 Cal.App.2d 238, 256, citing *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)

III.

Sufficiency of the Evidence—Attempted Murder

Appellant argues the attempted murder conviction must be reversed because the evidence was insufficient to show he specifically intended to kill Landon Wahlstrom. He asserts he would not have missed his target at such a close range if he had possessed lethal intent, and notes the absence of any statements to the effect that he wished to kill Wahlstrom. We are not persuaded.

When reviewing the sufficiency of the evidence on appeal, we apply the well-established and "highly deferential" substantial evidence standard. (*People v. Lochtefeld* (2000) 77 Cal.App.4th 533, 538.) "The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" (*People v. Jones* (1990) 51 Cal.3d 294, 314.) We do not reweigh the credibility of witnesses or substitute our own view of the evidence for that of the jury. (*People v. Fierro* (2010) 180 Cal.App.4th 1342, 1347.) That the evidence might be reasonably reconciled with a contrary result does not warrant a reversal of the judgment. (*Ibid*.) "The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Mincey* (1992) 2 Cal.4th 408, 432.)

Attempted murder requires a direct but ineffectual act toward killing a person, accompanied by the mental state of express malice aforethought, i.e., a specific intent to unlawfully kill. (*People v. Houston* (2012) 54 Cal.4th 1186, 1217 (*Houston*); *People v. Perez* (2010) 50 Cal.4th 222, 229.) " 'The act of firing toward a victim at a close, but not point blank, range "in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill. . . ." [Citations.]' " (*People v. Smith* (2005) 37 Cal.4th 733, 741 (*Smith*).) Here, the evidence showed appellant fired four or five rounds toward Wahlstrom at a distance of a few feet, from which the jury could readily infer an intent to kill. An expert testified that Waholstrom would have been struck by the bullets if he had not ducked.

Appellant's reliance on *People v. Belton* (1980) 105 Cal.App.3d 376, 380 (*Belton*), is misplaced. The defendant in that case was convicted of arson and attempted murder after setting fire to the porch of his ex-wife's apartment following a visit with her earlier in the day. The *Belton* court reversed the attempted murder conviction because apart from a quarrel three months earlier, there was no evidence of any threats, continued bad blood, or earlier attempts to harm the ex-wife, making an inference of intent to kill entirely speculative. (*Id.* at pp. 380–381.) *Belton* is distinguishable on its facts and has no application to a case such as this, where the defendant fired several shots toward his victim at close range.

Appellant cites dicta in *Belton* that the specific intent required for attempted murder "cannot be inferred merely from the commission of another dangerous crime . . . [such as] . . . assault-with-a-deadly-weapon." (*Belton*, *supra*, 105 Cal.App.3d at p. 380.) This proposition is questionable, because the decisions on which *Belton* relied on to support it involved instructional error allowing a jury to *presume* an intent to kill merely from evidence of an assault with a deadly weapon. (*People v. Snyder* (1940) 15 Cal.2d 706; *People v. Miller* (1935) 2 Cal.2d 527; *People v. Maciel* (1925) 71 Cal.App. 213.) These cases have no bearing on whether it is reasonable to *infer* the intent to kill from firing a loaded gun at someone. Additionally, the language in *Belton* appears contrary to

Smith, supra, 37 Cal.4th at page 741. Appellant's attempted murder conviction was supported by substantial evidence.

IV.

Failure to Instruct on Attempted Voluntary Manslaughter

Appellant argues the trial court erred in denying his request for jury instructions on attempted voluntary manslaughter as a lesser included offense of attempted murder, based on a heat of passion theory. (See *People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1136–1137.) We disagree.

A trial court has a duty to instruct on a lesser included offense when there is substantial evidence, viewed in the light most favorable to the defendant, from which a rational jury could conclude the defendant committed the lesser offense and is not guilty of the greater crime. (*People v. Moye* (2009) 47 Cal.4th 537, 553 (*Moye*); *People v. Breverman* (1998) 19 Cal.4th 142, 162.) Although the duty to instruct on a lesser included offense implicates the defendant's constitutional right to have the jury determine every material issue in the case (*People v. Cook* (2006) 39 Cal.4th 566, 596), the standard for requiring such instruction is not " ' "*any* evidence, no matter how weak," ' " but evidence " ' "substantial enough to merit consideration" by the jury.' " (*Moye*, at p. 553.)

Attempted murder requires a direct but ineffectual act toward killing a person, accompanied by the mental state of express malice aforethought. (*Houston, supra,* 54 Cal.4th at p. 1217.) Attempted voluntary manslaughter is the unlawful killing of a person without malice, and is a lesser included offense of attempted murder. (*People v. Speight* (2014) 227 Cal.App.4th 1229, 1241.) A defendant who acts in a sudden quarrel or heat of passion lacks the malice necessary for attempted murder. (*Ibid.*)

The heat of passion variant of voluntary and attempted voluntary manslaughter has both a subjective and an objective component: "The defendant must actually, subjectively, kill [or attempt to kill] under the heat of passion. [Citation.] . . . [But the] 'passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances.' " (*People v.*

Steele (2002) 27 Cal.4th 1230, 1252–1253.) " 'The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection.' " (*Moye, supra*, 47 Cal.4th at p. 550.) The provocation must come from the actual victim or be conduct the defendant reasonably believed to have been committed by the actual victim. (*People v. Verdugo* (2010) 50 Cal.4th 263, 294; *People v. Avila* (2009) 46 Cal.4th 680, 705.)

Applying these principles, we conclude there was no substantial evidence to support an instruction on attempted voluntary manslaughter based on provocation and heat of passion. The subjective component was not satisfied because nothing in the record suggests appellant was acting under the influence of a strong emotion. The objective component is not satisfied because Wahlstrom did nothing that could be considered provocative, much less provocative enough to "render an ordinary person of average disposition 'liable to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.' " (*People v. Beltran* (2013) 56 Cal.4th 935, 957.) At most, the evidence showed Wahlstrom was dating a young woman to whom appellant was attracted but with whom he had never been romantically involved with.

Rather than being a crime of passion, the shooting involved a considerable amount of cold-blooded planning: from purchasing the protective clothing and gear that would conceal appellant's appearance, to procuring the license plate that would be attached to the motorcycle used in the crime, to waiting and watching for Wahlstrom to appear on the morning of the shooting. The evidence did not support an instruction on attempted voluntary manslaughter, but even if it had, the jury found the attempted murder to be premeditated. Any error in failing to give the instruction was harmless. (*People v. Peau* (2015) 236 Cal.App.4th 823, 831–832 [failure to give heat-of-passion instruction was harmless beyond a reasonable doubt when the jury found murder was premeditated].)

V.

Flight Instruction—CALCRIM No. 372

Over defense objection, the trial court gave a modified version of CALCRIM No. 372, regarding the permissible inferences to be drawn from appellant's flight at the time of his arrest: "If the defendant fled or tried to flee during his apprehension, that conduct might show that he was aware of his guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself." Appellant argues the instruction should not have been given because "the arrest was remote in time and occurred at a location different from that in which the crimes occurred." Again we disagree.

We have already concluded that appellant's flight at the time of his arrest was admissible to show his consciousness of guilt. When such evidence is admitted, it is proper for the court to give a flight instruction. (Pen. Code, § 1127c; *People v. Mason* (1991) 52 Cal.3d 909, 943.) CALCRIM No. 372 is a correct statement of the law pertaining to flight and consciousness of guilt. (*Mendoza, supra,* 24 Cal.4th at pp. 179–181; *People v. Hernandez Rios* (2007) 151 Cal.App.4th 1154, 1157–1159.)

Appellant cites *People v. Watson* (1977) 75 Cal.App.3d 384, 403, for the proposition that a jury may not infer a consciousness of guilt merely because the defendant left the crime scene or was arrested at a later date and at a location different than that of the crime itself. In *Watson*, however, the defendant did not struggle or attempt to flee at the time of his arrest. (*Ibid.*) Here, the evidence showed appellant ran away from officers at the time of his arrest, a circumstance from which the jury could readily infer a consciousness of guilt. The court did not err by instructing on flight.

VI.

Failure to Give Instructions Requested by Defense

Appellant contends the trial court erred by inadvertently failing to give three standard jury instructions it had previously agreed to give at the request of the defense: CALCRIM Nos. 303, 318 and 333. The People argue the omission of the instructions was harmless. We agree with the People.

CALCRIM No. 303 would have advised the jury: "During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other." Appellant argues that without this instruction, the jury could have considered his flight and his possession of the unrelated handgun at the time of his flight as evidence of his guilt. But the flight evidence *was* admissible to prove consciousness of guilt, and CALCRIM No. 372 advised the jury that such evidence was not sufficient by itself to prove guilt. On appeal, appellant has identified no other "limited purpose" evidence to which CALCRIM No. 303 might have applied, and it is not reasonably probable the jury would have reached a different result if that instruction had been given. (*People v. Larsen* (2012) 205 Cal.App.4th 810, 830; *Watson*, *supra*, 46 Cal.2d at p. 836.)[4]

CALCRIM No. 318 reads: "You have heard evidence of statements that a witness made before the trial. If you decide that the witness made those statements, you may use those statements in two ways: (1) To evaluate whether the witness's testimony in court is believable; ¶ AND ¶ (2) As evidence that the information in those earlier statements is true." Appellant has identified no evidence to which this instruction would have applied and it is not reasonably probable he was prejudiced by its omission.

Finally, CALCRIM No. 333 would have explained how the jury was to evaluate lay opinion testimony: "(A Witness or Witnesses) not testifying as [an] expert[s],] gave (his/her/their) opinion[s] during the trial. You may but are not required to accept (that/those) opinion[s] as true or correct. You may give the opinion[s] whatever weight you think appropriate. Consider the extent of the witness's opportunity to perceive the

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[4] In the trial court, defense counsel argued the instruction was applicable to evidence admitted over a hearsay objection to explain the witness's future conduct. Appellant does not make the same point on appeal, but we note the defense had objected on hearsay grounds to an officer's testimony that she had reviewed surveillance videos of the Golden Gate Bridge after being told she was looking for a black motorcycle with a rider wearing black clothing and a black helmet. Given that eyewitness testimony established the description of the shooter on the motorcycle, appellant could not have been prejudiced by this testimony if it was considered for its truth.

matters on which his or her opinion is based, the reasons the witness gave for any opinion, and the facts or information on which the witness relied in forming that opinion. You must decide whether information on which the witness relied was true and accurate. You may disregard all or any part of an opinion that you find unbelievable, unreasonable, or unsupported by the evidence." The jury was instructed on the same factors with respect to expert testimony in CALCRIM No. 332, and the court also gave CALCRIM No. 226 regarding the general assessment of witness credibility. Appellant does not explain how he was prejudiced by the omission of CALCRIM No. 333 and has not established a reasonable probability he would have obtained a more favorable result had it been given.

VII.

Failure to Give Supplemental Instruction on Attempted Murder

Appellant argues his attempted murder conviction must be reversed because the trial court did not adequately respond to a jury request for clarification of the elements of that crime. We reject the claim.

The trial court instructed the jury with CALCRIM No. 600, which set forth the elements of attempted murder: "The defendant is charged [in Counts 1 and 2] with attempted murder. [] Count 1 relates to Mr. Wahlstrom. Count 2 relates to Ms. Dedier. [¶] To prove that the defendant is guilty of attempted murder, the People must prove that: [¶] 1. The defendant took at least one direct but ineffective step toward killing (another person [)] [¶] AND [¶] 2. The defendant had the specific intent to kill (that) (person). [¶] A direct step requires more than merely planning or preparing to commit murder or obtaining or arranging for something needed to commit murder. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. A direct step indicates a definite and unambiguous intent to kill. It is a direct movement toward the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt." The parties agreed to the version of CALCRIM No. 600 given by the court.

During deliberations, the jury sent the following note to the court: "Regarding CALCRIM 600 — Att. Murder. [¶] 'It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance had not interrupted that attempt.' [¶] If the defendant had a plan and put it in motion but at the last instant changed his mind based on the immediate circumstances, does that constitute attempted murder?" The court responded in writing on the same note, "I cannot answer this question. It is up to you to decide, based upon all of the evidence." Both attorneys agreed to the court's answer and initialed the document.

Appellant argues the court's response violated his right to due process and amounted to a derogation of its duty to fully instruct on general principles of law relevant to the case. (See *Breverman*, *supra*, 19 Cal.4th at p. 154.) We do not agree. CALCRIM No. 600 correctly defines attempted murder. (*People v. Lawrence* (2009) 177 CalApp.4th 547, 556.) Appellant has forfeited any argument that the court should have provided a supplemental instruction by failing to object to the trial court's response to the jury's question and by failing to propose an alternative answer. (*People v. Davis* (2009) 46 Cal.4th 539, 616–617; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1193; *People v. Bohana* (2000) 84 Cal.App.4th 360, 372–373.) Indeed, appellant does not propose an appropriate answer to the question in his appellate briefs, and offers no clue as to what he believes the trial court should have said in response.

Even if the claim had been preserved on appeal, we would find no error. Penal Code section 1138 provides that when the jurors "desire to be informed on any point of law arising in the case . . . the information required must be given." But, "[t]his does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation.] Indeed, comments diverging from the standard are often risky. [Citation.] . . . [The court] should decide as to each jury question whether further explanation is desirable, or whether it should merely reiterate the instructions already given." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.)

The jury's question regarding the effect of a last minute change of mind was inherently fact specific and did not lend itself to a simple yes or no answer. A direct and complete answer to the question would have required some comment on the evidence under various factual scenarios (how far had the defendant progressed in his plan? what were the immediate circumstances that caused him to change his mind?) and would have run the risk of being unduly argumentative, that is, of inviting the jury to " ' "draw inferences favorable to one of the parties from specified items of evidence." ' " (*People v. Battle* (2011) 198 Cal.App.4th 50, 85.) The trial court did not abuse its discretion by declining to expand on the language of CALCRIM No. 600.

We note that unused bracketed language in CALCRIM No. 600 was potentially responsive to the jury's question: "[A person who attempts to commit murder is guilty of attempted murder even if, after taking a direct step toward killing, he or she abandons further efforts to complete the crime, or his or her attempt fails or is interrupted by someone or something beyond his or her control. On the other hand, if a person freely and voluntarily abandons his or her plans before taking a direct step toward committing the murder, then that person is not guilty of attempted murder.]" The court did not include this portion of the instruction because both counsel agreed it did not apply, but if the language had been included, it would not have been beneficial to the defendant. To the contrary, firing five shots was certainly a direct step toward committing a murder, and the bracketed portion of the instruction would have effectively advised the jury that a change of heart was of no effect once this step was taken.

VIII.

Cumulative Error

Appellant argues the asserted trial errors he has identified are cumulatively prejudicial even if they do not require reversal when considered individually. We disagree. None of the assumed errors significantly influenced the fairness of the trial, whether considered individually or cumulatively. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 128.)

IX.

Proposition 57

As previously noted, appellant was 17 years old at the time of the shooting in April 2012. The prosecutor directly filed the charges against him in adult court, as was permitted under former Welfare and Institutions Code section 707, subdivisions (b)(12) and (d)(1) and (2), rather than filing a wardship petition in juvenile court. On November 8, 2016, while this appeal was pending, California voters enacted Proposition 57, which amended Welfare and Institutions Code sections 602 and 707 to eliminate direct filing by prosecutors. (Prop. 57, § 4.2.) Under Proposition 57, all charges against juveniles must now be initially filed in juvenile court. (Welf. & Inst. Code, §§ 602, 707, subd. (a).) Though a district attorney may make a motion to transfer certain cases to adult court, the juvenile court is charged with making the decision and may do so only after it holds a hearing to consider such factors as the minor's maturity, degree of criminal sophistication, prior delinquent history, and potential for rehabilitation. (Welf. & Inst. Code, § 707, subd. (a).)

Appellant argues that Proposition 57's elimination of direct filing is an ameliorative provision that must be retroactively applied to defendants like him, whose cases are not yet final on appeal. He argues that although Proposition 57 is silent on the issue of retroactivity, the voters clearly intended to broaden the number of minors who could stay within the juvenile justice system with its emphasis on rehabilitation over punishment. Appellant also asks us to apply the rule of *In re Estrada* (1965) 63 Cal.2d 740, 744–745 (*Estrada*), under which a statute reducing the penalty for an offense is presumed to apply to cases not yet final. The Attorney General responds that Proposition 57 does not effect a reduction in punishment, and is presumed to apply prospectively only, at least as to cases that have not yet gone to trial. (See Pen. Code, § 3.)

These arguments have been thoroughly analyzed in a series of recent court of appeal decisions, and the issue of Proposition 57's retroactivity is currently pending before our Supreme Court. (See *People v. Cervantes* (2017) 9 Cal.App.5th 569, review granted May 17, 2017, A140464 [Proposition 57 is not retroactive, though as to counts

reversed for a retrial, Proposition 57 does apply and requires a fitness hearing to determine where that retrial will be held]; *People v. Mendoza* (2017) 10 Cal.App.5th 327, pet. rev. filed May 2, 2017, May 5, 2017 and May 8, 2017 [Proposition 57 is not retroactive]; *People v. Vela* (2017), 11 Cal.App.5th 68 (*Vela*), pet. rev. filed June 2, 2017 and June 5, 2017 [Proposition 57 is retroactive; convictions conditionally reversed and remanded to juvenile court for a fitness hearing]; *People v. Superior Court (Lara)* (2017) 9 Cal.App.5th 753, review granted May 17, 2017 [where crime was committed before effective date of Proposition 57 but case had not yet been tried, defendant was entitled to fitness hearing to determine whether case could proceed in adult court; although Proposition 57 is not retroactive, requiring a fitness hearing under these circumstances does not amount to retroactive application of the law because the trial has not yet been held]; *People v. Marquez* (May 16, 2017) 11 Cal.App.5th 816 [Proposition 57 not retroactive].)

Though the majority of appellate courts to consider the issue so far have reached a different result, we adopt the reasoning of *Vela*, *supra*, 11 Cal.App.5th 68 and conclude that Proposition 57 applies retroactively to cases pending on appeal. Given that the issue will be resolved by our Supreme Court, we need not elaborate on the reasoning of our colleagues to the south. We note, however, that a retroactive application of Proposition 57 is fully consistent with the relatively recent "sea change in penology regarding the relative culpability and rehabilitation possibilities for juvenile offenders" (*Vela*, at p. 75), as well as with one of the stated purposes of Proposition 57 itself, namely, to "[r]equire a judge, not a prosecutor, to decide whether juveniles should be tried in adult court." (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) text of Prop. 57, Public Safety and Rehabilitation Act of 2016, § 2 (5), p. 141.) We are also persuaded that the potential for a juvenile disposition in lieu of a prison sentence, which would almost certainly result in significantly less time in custody for a defendant found to have committed a crime for which direct filing was formerly available, effects a reduction in punishment within the spirit of *Estrada*, *supra*, 63 Cal.2d at p. 744, even if it does not lower the penalty for a particular offense. The case must be conditionally remanded for a fitness hearing before

the juvenile court, at which that court should, "to the extent possible, treat the matter as though the prosecutor had originally filed a juvenile petition in juvenile court and had then moved to transfer [the] cause to a court of criminal jurisdiction." (*Vela, supra,* 11 Cal.App.5th at p. 82.)

The Attorney General argues that even if Proposition 57 applies retroactively, remand is not required because it is not reasonably probable a juvenile court would retain appellant's case rather than transferring it to adult court. In support of this argument, the Attorney General cites *People v. Villa* (2009) 178 Cal.App.4th 443, 452–453 (*Villa*), in which the trial court erroneously denied the defendant's request for a post-trial fitness hearing under Penal Code § 1170.17, subdivision (c), after a juvenile defendant who was directly charged as an adult was convicted of a lesser included offense for which direct filing was not permitted. The court of appeal found the error to be harmless under the standard for state constitutional error articulated in *Watson, supra,* 46 Cal.2d at page 818. (*Villa,* at p. 453.)

Villa is distinguishable. There, the trial court relied on the probation report to conclude it was appropriate to treat the defendant as an adult. (*Villa, supra,* 178 Cal.App.4th at pp. 452–453.) The problem was not that the court failed to consider and make a determination of the defendant's fitness, but that it did so absent a hearing that was required by statute. Here, although extensive evidence about appellant's background was presented for sentencing purposes, the court did not consider the issue of fitness, namely, whether the minor is or is not "a fit and proper subject to be dealt with under the juvenile court law" in the first place. (Welf. & Inst. Code, § 707.1, subd. (a).) The court in the case before us did not commit an "error" that can be deemed "harmless;" rather, appellant's fitness was not, at the time of appellant's trial, an issue for the trial court to determine. We will not presume to analyze for the first time on appeal the factors relevant to a fitness determination.

X.

Cruel and Unusual Punishment

Appellant was sentenced to a term of life imprisonment for his attempted murder conviction, under which he will be eligible for parole after seven calendar years (Penal Code § 3046, subd. (a)(1)), plus a consecutive determinate term of 21 years four months for the firearm enhancement attached to the attempted murder count and the conviction of driving or taking a vehicle. He contends the sentence amounts to cruel and unusual punishment because he was 17 years old when he committed those offenses. In the event the judgment is reinstated after a fitness hearing under Proposition 57, we conclude the sentence imposed is not cruel and/or unusual.

Punishment that is grossly disproportionate to the offender's culpability violates the "cruel and unusual" punishment clause of the United States Constitution (U.S. Const., 8th Amend.) and the "cruel or unusual" punishment clause of the California Constitution (Cal. Const., art. I, § 17). In the juvenile context, several categorical rules have emerged to mitigate the risk of disproportionate punishment, in recognition that children possess "diminished culpability and heightened capacity for change." (*Miller v. Alabama* (2012) 567 U.S. 460, 479, (*Miller*); see *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1375.)

In *Roper v. Simmons* (2005) 543 U.S. 551 (*Roper*), the United States Supreme Court held the death penalty could not be imposed on a defendant who was a juvenile at the time of the offense. In *Graham v. Florida* (2010) 560 U.S. 48 (*Graham*), the court held the Eighth Amendment prohibits the imposition of a sentence of life without the possibility of parole (LWOP) on a juvenile convicted of a non-homicide offense. In *Miller*, *supra*, 567 U.S. at p. 479, 132 S.Ct. at p. 2469, it held the Eighth Amendment prohibits mandatory LWOP sentences in a homicide case. In *People v. Caballero* (2012) 55 Cal.4th 262, 268–269 (*Caballero*), our state Supreme Court extended the rules of *Graham* to non-homicide cases in which the juvenile offender received a sentence that is the functional equivalent of LWOP. And, in *People v. Franklin* (2016) 63 Cal.4th 261, 276 (*Franklin*), the court extended the *Miller* rule to homicide cases in which the sentence was the functional equivalent of LWOP.

Attempted murder is classified as a non-homicide offense for purposes of assessing the constitutionality of the sentence. (*Caballero*, *supra*, 55 Cal.4th at pp. 265–268 & 271 (con. opn. by Werdegar, J.) Under *Graham* and *Caballero*, we must therefore consider whether the sentence imposed is unconstitutional because it is the functional equivalent of LWOP. It is not.

Assuming appellant earns in-prison work credits at 15 percent (§§ 2933.1, subd. (a), 667.5, subd. (c)(12)), he would serve approximately 18 years on the determinate portion of his sentence, followed by seven calendar years on the indeterminate life term, before being eligible for parole. (See § 669; *People v. Garza* (2003) 107 Cal.App.4th 1081, 1085 [when sentence on determinate term is ordered to run consecutive to indeterminate term, determinate term shall be served first]; *In re Monigold* (1983) 139 Cal.App.3d 485, 491 [in-prison conduct credits may not be used to reduce seven-year minimum eligible parole date under § 3046].) When the 731 days of presentence credits are subtracted from this 25 year total, this leaves less than 23 years from the date of sentencing. Appellant was 19 years old at the time of his sentencing hearing, meaning he will be eligible for parole when he is approximately 42 years old.

In *People v. Perez* (2013) 214 Cal.App.4th 49, 55–58 (*Perez*), the court considered the constitutionality of a 30-year-to-life sentence imposed on a juvenile offender convicted of a forcible lewd act and sexual penetration of a child. It upheld the sentence after a thorough review of the published California cases addressing cruel and unusual punishment claims by juvenile offenders: "There is a bright line between LWOP's and long sentences *with* eligibility for parole *if* there is some meaningful life expectancy left when the offender becomes eligible for parole. We are aware of—and have been cited to—no case which has used the *Roper-Graham–Miller–Caballero* line of jurisprudence to strike down as cruel and unusual any sentence against anyone under the age of 18 where the perpetrator still has substantial life expectancy left at the time of eligibility for parole. [¶] How *much* life expectancy must remain at the time of eligibility for parole of course remains a matter for future judicial development, but we can safely say that in the case before us there is plenty of time left for Perez to demonstrate, as the *Graham* court

put it, 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.' (*Graham, supra*, 130 S.Ct. at p. 2030 ['A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime.'].) There is no dispute that, given all the credits already served by Perez, he will be eligible for parole when he reaches age 47. That is, by no stretch of the imagination can this case be called a 'functional' or 'de facto' LWOP, and therefore neither *Miller*, *Graham*, nor *Caballero* apply. [Fn. omitted.]"

Like the defendant in *Perez*, appellant is not serving a sentence that is the functional equivalent of LWOP. The jurisprudence of *Graham-Miller-Caballero* does not apply to his claim that his sentence was categorically barred due to his age at the time of the offenses. He makes no argument on appeal that his sentence is disproportionate to his individual culpability and amounts to cruel and/or unusual punishment in his particular case. (See *Graham, supra*, 560 U.S. at p. 59; *In re Lynch* (1972) 8 Cal.3d 410, 424; *People v. Haller* (2009) 174 Cal.App.4th 1080, 1092.)

Additionally, appellant's cruel and unusual punishment claim is effectively moot. Recently-enacted Penal Code section 3051 makes youthful offenders such as appellant eligible for release on parole during the 25th year of their incarceration when they stand convicted of an offense carrying a life sentence. In *Franklin, supra*, 63 Cal.4th at pages 268, 277, our Supreme Court held that this provision effectively supersedes any sentence that is the functional equivalent of LWOP and renders moot a challenge under the *Graham-Miller* line of cases.

The court in *Franklin* did remand that case for a new hearing because the defendant had not been provided with the opportunity to make a record of the factors that impacted him as a youthful offender, such information being more likely to be available at the initial sentencing rather than at a parole hearing 25 years later. (*Franklin, supra*, 63 Cal.4th at pp. 283–284.) Here, however, appellant has already had that opportunity and provided the trial court with a wealth of information regarding his upbringing and other factors relevant to sentencing. Remand is not required for this purpose.

DISPOSITION

The judgment is conditionally reversed. The case is remanded to the juvenile court with directions to conduct a fitness hearing under Welfare and Institutions Code section 707, subdivision (a), no later than 90 days from the filing of the remittitur. If, at the fitness hearing, the court determines it would have transferred appellant to a court of criminal jurisdiction because he is "not a fit and proper subject to be dealt with under the juvenile court law" (Welf. & Inst. Code, 707.1, subd. (a)), then the judgment shall be reinstated. If, at the fitness hearing, the court finds it would not have transferred the case to a court of criminal jurisdiction, it shall treat appellant's convictions as juvenile adjudications and shall impose an appropriate disposition under juvenile law.

NEEDHAM, J.

I concur.

SIMONS, ACTING P.J.

(A141133)

BRUINIERS, J., Concurring and dissenting.

I agree with my colleagues in all respects save one. I disagree that the Public Safety and Rehabilitation Act of 2016 (Proposition 57) is to be given retroactive effect in these circumstances, and I would affirm the judgment unconditionally.

Proposition 57, which became effective November 9, 2016, eliminated the People's ability to directly file criminal charges against a minor in an adult court. The majority acknowledges that Proposition 57 is silent as to the initiative's retroactive application. The presumption, therefore, is that it is not retroactive. (Pen. Code, § 3 [no part of the Penal Code is retroactive "unless expressly so declared"]; *People v. Brown* (2012) 54 Cal.4th 314, 319 [the default rule of Pen. Code, § 3 codifies " 'the time-honored principle . . . that in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application' "]; (*In re Estrada* (1965) 63 Cal.2d 740, 746 (*Estrada*) ["when there is nothing to indicate a contrary intent in a statute it will be presumed that the Legislature intended the statute to operate prospectively and not retroactively"].) " ' "[A] statute that is ambiguous with respect to retroactive application is construed . . . to be unambiguously prospective." ' " (*Brown*, at p. 320.)[1]

The majority would apply, however, the ameliorative rule of *Estrada*, providing for retroactive application of a statutory amendment reducing punishment for an act committed before the amendment, but for which a defendant was sentenced after the amendment. In *Estrada*, the Supreme Court held that, notwithstanding Penal Code section 3, "[w]hen the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter

[1] In interpreting a voter initiative, we apply the same principles that govern statutory construction. (*People v. Arroyo* (2016) 62 Cal.4th 589, 593.)

punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final." (*Estrada*, *supra*, 63 Cal.2d at p. 745.) "*Estrada*, which creates a presumption of retroactivity in apparent contradiction to the default rule [of Penal Code section 3], has been confined by subsequent decisions to its ' "specific context." ' " (*People v. Davis* (2016) 246 Cal.App.4th 127, 135, citing *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1196, disapproved on other grounds in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

Only one other appellate court has applied Proposition 57 retroactively, relying upon the rationale of *Estrada*. In *People v. Vela* (2017) 11 Cal.App.5th 68, Division Three of the Fourth District held that the electorate intended the benefits of Proposition 57 to apply to every minor to whom it may constitutionally apply, including the defendant whose conviction was on appeal. (*Id*. at p. 81; see *id.* at p. 71.) The *Vela* court conditionally reversed and ordered a remand for the juvenile court to conduct a juvenile transfer hearing under Welfare and Institutions Code section 707, the remedy the majority proposes here. (*Vela*, at pp. 82–83.) My colleagues in the majority find the reasoning of *Vela* persuasive. I do not.

As the majority acknowledges, every other court to examine the issue so far in a published opinion has reached a contrary conclusion. (*People v. Superior Court* (*Walker*) (June 8, 2017) ___ Cal.App.5th ___ [2017 Cal.App.Lexis 532]; *People v. Marquez* (2017) 11 Cal.App.5th 816; *People v. Mendoza* (2017) 10 Cal.App.5th 327; *People v. Superior Court* (*Lara*) (2017) 9 Cal.App.5th 753, review granted May 17, 2017, S241231; *People v. Cervantes* (2017) 9 Cal.App.5th 569, review granted May 17, 2017, S241323.)

As is also true, our Supreme Court has granted review in *Cervantes* and *Lara*, and will ultimately provide a definitive answer to the question. Therefore, like my colleagues in the majority, I see no need to expand on the reasoning of my colleagues in *Walker*, *Marquez*, *Mendoza*, *Lara*, and *Cervantes*. I join those courts in concluding that Proposition 57 has no retroactive application postconviction, at least in the absence of a reversal and retrial. I therefore disagree that the trial court is required to conduct a historical analysis to determine if this now nearly 23-year-old defendant would have been suitable for juvenile court treatment.

I concur in part and dissent in part.

BRUINIERS, J.

A141133